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LEGAL THEORY AND THE PRACTICE OF LAW

BY H. ROTTSCHAEFER*

THE same body of data may be considered from more than a single point of view. A given geological formation means one thing to an oil prospector, and a quite different thing to a paleontologist. Their arrangements of the facts in the order of their relative importance would show considerable differences; the selections of each would be determined by his special interests or purposes. The data of our legal system and the facts of the social life it is intended to control in part can likewise be viewed from various angles. The questions that can legitimately be asked concerning them are as numerous and varied as the interests of those who make them the subject of inquiry. The first interest of those actively engaged as lawyers or judges in the practical administration of law is perforce the problem of the law applicable to particular situations. An agent innocently exceeds his powers and purports to make a contract between his principal and a third party who claims compensation from the agent for the loss due to his failure to procure a contract binding the principal. The problem of the lawyer and judge is to determine the legal rule, if any, governing the relationships involved in the group of facts that constitutes this case. Its decision will eventuate in the formulation of a rather narrow and specific rule describing the constitutive facts and their legal consequences. It is, therefore, not unnatural that the attention of those concerned with the practical administration of law has been focussed on the question of what is *the* law. This special emphasis is not necessarily incompatible with a broader interest in the legal system, but it may easily induce the view that the general problems of law have but a minor significance, particularly for those whose primary interest is in its practice. The succeeding discussion is intended to examine the validity of that position, and to consider the practical importance of scientific and philosophic examinations of our legal system that are still frequently deemed mere speculative inquiries of doubtful value. This is in substance the problem of the value of jurisprudence considered as the study of the general problems of law.

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There is no generally accepted definition of the term jurisprudence, and no general agreement as to what subjects are within its scope. The adoption of the definition of the analytical school that it is the formal science of positive law¹ would definitely exclude the whole contribution of the philosophical and sociological jurists. If the adoption of a new terminology were as easy as its invention, it would be desirable to apply distinct terms to these extremely diverse approaches to legal systems as is done by some of the writers of Continental Europe.² This would not, however, eliminate disputes as to what general aspects of law deserved consideration, and is not likely to be soon achieved. The term will probably continue to be used to describe lines of inquiry differing greatly in their aims and techniques. It is necessary, therefore, to state briefly the broad outlines of the competing conceptions of jurisprudence. Practically all attempted definitions can be classified into those that emphasize its character as a science,³ those that stress its character as philosophy,⁴ and those that recognize both these elements without particularly stressing either.⁵ It is immaterial for present purposes to consider the relative merits of these views; it is sufficient to state that, if the name is to continue to be applied to the diverse discussions which it is presently made to cover, it will have to be defined to include both the science and philosophy of law. There is no particular objection to including within a single field of study such diverse types of thought if only it be clearly recognized that jurisprudence as a science and philosophy have entirely distinct aims and, consequently, methods. The inclusion of both means only that the data of legal systems raise certain problems susceptible of treatment by the methods of science, and others that can be dealt with only by philosophic inquiry.

The aim of science has been described as the classification of facts and the recognition of the relationships existing between them.⁶ The facts which a science of law would aim to classify comprise a limited part of the conduct of men living in society. A makes a false statement about B to C who, influenced thereby,

¹Holland, *The Elements of Jurisprudence*, 11th ed., chapter I.

²Berolzheimer, *The World's Legal Philosophies* (The Modern Legal Philosophy Series, II) Introduction; Gareis, *Science of Law*, sec. 3.

³Holland, *op. cit.*

⁴Lorimer, *Institutes of Law* 2nd ed., 353, 355.

⁵Salmond, *Jurisprudence* 7th ed., pages 1-16.

⁶Karl Pearson, *The Grammar of Science*, 3rd ed. p. 6.

refuses to employ B whom he had been intending to take into his service. This aggregate of facts is not one requiring to be classified by any science of law, however much it may raise the problem of whether it ought to be covered by a legal rule. If, however, there be added the fact that organized society (which under modern conditions of politically organized society usually means the state, whatever it may have meant in other historical periods), acting through one of its recognized agencies, will compel A to compensate B for the injury in fact inflicted upon him, or impose on A other defined consequences, the fact group assumes a different complexion and becomes a datum of a legal system.⁷ A legal datum may be defined as any group of facts that includes the reaction of organized society, acting through its recognized agencies, to the situation composed by the other facts of the group. It is not essential that such fact group shall ever have existed. A statute may define as a crime a certain combination of facts which, coupled with the fact of the defined social reaction thereto, constitutes a legal datum even before any such group has in fact occurred. It is these legal data that it is the function of the science of law to classify.

Each such datum can be expressed in some form of proposition of which the legal rule furnishes an example. Legal rules are mere devices of our thinking for describing the groups of facts and relationships denoted by the term legal data. The rule that two witnesses to a will are required to give it validity is a form of mental short-hand to describe the fact that society has undertaken to establish a certain relationship between defined facts. The body of these rules themselves constitute an independent object of our knowledge distinct from the fact groups they summarize, and as such comprises the working tool of the lawyer and judge. There is none who would question the desirability of systematizing the body of those rules as an aid to fashioning a more efficient tool for practice. The systematization of those rules affords the easiest approach to the classification of the legal data described by those rules in so far as the purpose is merely the construction of a technique that will make those data easier to handle. This has been the primary aim of analytical jurisprudence which has been rather aptly described as the application of logic to law.⁸ Its principal instruments have been the concept and

⁷See J. W. Bingham, *What is Law*, 11 Mich. L. Rev. 1, 109.

⁸See anonymous article, commonly attributed to J. S. Mill, entitled, *Austin on Jurisprudence* in 118 *Edinburgh Review* 439.

definition which may be defined as general ideas denoting the presence of common elements among the legal data included therein. The state, for example, has undertaken to protect the physical integrity of A's person against B's aggression; it has also assumed to recognize A's claim to be served by a public utility when A demands the service if he offers to comply with the utility's reasonable regulations. These diverse situations possess the common element that the state recognizes A's affirmative claim to a certain course of conduct by B and the utility which is described by saying that A has in each case a right against the other party. The general idea "right" is a device of our thinking that permits a number of concrete legal data to be grouped together, and denotes a point of view from which those data can be conceived of as members of a single class. The same is true of the terms used to describe other types of legal relation such as duty, power, and liability, and combinations of such relations as property. Any legal system is likely to include a considerable number of such analytical or formal general ideas that frequently imply classifications of legal data on different bases. The general term "property" denotes not a single legal relation but an aggregate of several of them, such as rights, powers, and privileges.⁹ A classification of legal data on the basis of the kind of legal relation involved would result in distributing the data described by the term "property" among several classes; a classification on the basis of the type of interest protected might bring them all within a single group. The distribution of the materials varies with the basis of classification adopted, and that depends wholly on the purpose for which it is made. The formal general ideas heretofore mentioned have been devised to impose on legal data a measure of system and logical integration as an aid to our thinking about the legal system and to its use as a tool for practice. They describe the forms under which facts must be presented if they are to be considered as factors in a legal problem, but can not furnish the content of the rule that will define the social reaction to those facts. The concepts legal right and duty are invaluable in formulating as a legal problem the relations between A and B when the former suffers nervous prostration caused by fright, unaccompanied by physical impact, due to the latter's carelessness; but the decision for or against A's claim to protection from injuries thus caused requires a resort to factors not implicit in the

⁹Hohfeld, *Fundamental Legal Conceptions* 96 ff.

definition of these formal logical concepts.¹⁰ The general conceptions of the legal science of the analytical jurists are a framework that gives form and system to our thinking about legal data, and are valuable only within those limits. They furnish no aid in dealing with other important general problems of law.¹¹

There are, however, numerous points of view from which the facts of a legal system may be considered and classified. All involve the same resort to generalization that characterizes the approach of the analytical jurists, and as a consequence a degree of systematization of legal data. A useful approach to legal data is that which considers their content as distinct from their formal aspects. It is of some value to analyze the concept "property" into its component formal elements;¹² it is of greater value to discover broad principles expressing the content or substance of a variety of specific legal data involving the aggregate of legal relations described by that concept. The principle that no one can transfer a better title than he himself has may be taken as an illustration. It sums up a great number of specific legal rules dealing with the transfer and acquisition of property, although it does not cover them all since there are circumstances under which our law confers a power to transfer a better title than the transferor had. The power of a thief to transfer a good title by sale in market overt is a familiar historical instance. Every developed legal system contains a great number of such generalizations that summarize the content of numerous specific legal rules, but whose scope is frequently less extensive than the totality of rules concerned with the relationships dealt with in the generalization. There are exceptions to practically every general legal principle that has ever been formulated. The exceptions to one principle are frequently the specific data of another generalization. The rule that an owner can be divested of his property by a sale by the person to whom he has entrusted its possession under circumstances clothing the latter with apparent ownership is clearly in conflict with the logical implications of the principle denying one's power to transfer a better title than he had; it is, however, within the principle that he whose acts produce an appearance that certain facts exist will not be permitted to deny that such facts

¹⁰For a discussion of the factors that have influenced courts in deciding cases of that character, see *Green v. Shoemaker*, (1909) 111 Md. 69, 73 Atl. 688 and cases therein cited.

¹¹M. R. Cohen, *The Place of Logic in the Law*, 29 Harv. L. Rev. 622.

¹²Hohfeld, *op. cit.*; Holland, *op. cit.*, at pp. 187 ff.

existed if to do so would injure those who have acted in reliance upon such appearances.

Generalizations of the character under consideration perform a different function within the legal system than the system of formal concepts of the analytical jurists. They are something more than a convenient device for retaining and dealing with the mass of detailed legal rules and data. They are in practise the major premises of a great deal of the judicial reasoning employed in the development of the law. Their function as such is not, and cannot be, due to their character as summaries of past legal experiences and data already contained within the legal system; it is due rather to the desire to give to the content of the legal system a degree of logical consistency as an aid to certainty and predictability. Their use in the processes of legal deduction is based on the assumption that it is desirable that law have those characteristics; its validity is not a problem for legal science. The process of logical deduction from accepted premises accounts for a part only of the content of legal systems. The facts of individual and social life are the really vital determinants of that content, and our present knowledge negatives any theory that they follow lines defined by the requirements of logical thinking. The clearest proof of this is the frequent occurrence of cases to which several general principles are applicable that would, however, result in contradictory decisions. The situation described near the close of the preceding paragraph illustrates this difficulty. The decision in such case cannot be reached by any amount of the most accurate logical deduction. There must be a preliminary selection of one of those principles as a premise if the case is to subsumed under an existing principle. That selective process is not a matter of formal logic at all. The factors that determine that choice are much more significant in shaping law's contents than is the logical deductive process employed in deciding particular cases on the basis of those principles. The real reasons that induced the court in *Rylands v. Fletcher*¹³ to adopt as its premise the principle of acting at one's peril rather than that of liability based on fault, are more important for an understanding of law and its development than the fact that courts give their reasoning the forms of logical thinking.¹⁴ It is true that the content of legal systems achieves

¹³(1868) L. R. 3 H. L. 330.

¹⁴O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457.

a measure of systematization through these generalizations, but it will probably never acquire the degree of logical integration attainable in classifying legal data from the point of view of their formal characteristics. The chief importance of this type of generalization is, however, their function as premises for legal reasoning in the development of law.

Generalizations of this character can be arranged in an hierarchy on the basis of how extensively they pervade the system. The principle as to the transfer of title heretofore mentioned is less pervasive than the conception of public policy which invalidates contracts, interposes barriers to the alienation of property, and generally leaves wrongdoers where it finds them. The standards of good faith and reasonable care, which are merely shorthand devices for indicating certain broad generalizations, are applied in a great many distinct fields. The most inclusive are what may be called its broad premises or general assumptions. These are frequently the most difficult to discover since they are quite as likely to be tacitly assumed as explicitly formulated. A reference to several found in our own system will make clear what is meant. The body of common and statute law dealing with monopolies and contracts in restraint of trade involves an assumption that it is on the whole desirable to maintain a competitive economic order. Many of the decisions on the limits imposed on the substance of legislation by the due process clauses of our constitutions are expressions of a strong belief in the theory of individualism. Mr. Justice Holmes may be correct in his statement that the fourteenth amendment did not enact Herbert Spencer's Social Statics,¹⁵ but the prevalence of the ideas expressed therein at least helps in understanding the decisions interpreting that amendment during the last quarter of the last century. The commerce clause of the federal constitution definitely embodies a policy of free trade among the states. These premises and assumptions are as much a part of the legal system as the narrower principles that merely summarize a series of specific legal rules, since they furnish the starting point for a considerable body of legal and judicial reasoning. It is immaterial that they may be derived from the social and philosophic preferences of those in a position to influence and shape the development of law, and that their discovery may require a resort to past or current social theories and philosophies.

¹⁵Dissent in *Lochner v. New York*, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539.

Some of them are discoverable by an inductive study of the materials of the legal system itself. As in the case of the narrower principles, their logical implications are frequently inconsistent, and for the same reasons. The principle of freedom of contract carries a germ capable of destroying the competitive economic order. The terms in which these premises and assumptions are formulated are broad and vague. Such conceptions as due process and police power defy precise definition or even accurate description. This factor not infrequently results in obscuring the fact that a particular decision has involved a choice between competing premises. A court is required to determine the validity of a state statute prescribing minimum wages for women in industry. The court might approach the question from a conception of the police power as the power to promote the general welfare or as the power to promote that welfare only by methods not involving arbitrary limitations on individual freedom. The adoption of the latter would not as clearly disclose the fact of a choice between the premise of the primacy of the social interest and that of individualism. That choice, which is inevitable in such case, has been made in defining the premise. The narrower principles remain fairly fixed in their actual content, but those more inclusive generalizations herein described as the premises and assumptions of a legal system are constantly changing in fact through the process of redefinition even though they may retain their older forms. The due process clause was not in fact the same in *Lochner v. New York*¹⁶ as in *Muller v. Oregon*.¹⁷ New wine is constantly being poured into old bottles.

The preceding discussion has shown how extensively the selection of premises and choosing between them in cases of conflict affect the development of law, and function in shaping its content. The creative power of these general ideas is not due to the fact that they are taken as major premises for legal reasoning. That is a merely formal incident to our efforts to cast our legal thinking in the forms of logical deduction. The reason that invalidates contracts in unreasonable restraint of trade is that our society has adjudged competition in the economic sphere desirable and has undertaken to make that judgment effective through state force, not the fact that the proposition can be logically deduced from a premise embodying that judgment. The factor that gives these

¹⁶(1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937.

¹⁷(1908) 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324.

generalizations their creative force is the character of the data summarized by them. They are in form summarizations of the past reactions of the organized social group to definite situations. The principle that no one can transfer a better title than he himself had sums up a great many specific cases in which society has refused to recognize as the owner of a thing one who acquired it from a non-owner. The social reactions thus summarized may or may not have been based on reasons clearly perceived and definitely formulated; they may have had no other basis than vague feeling or instinct. Whatever their basis, they embody a judgment as to the value of some human end or activity or the relative values of different human ends and activities. The principle just given by way of illustration clearly implies a judgment that, in the situations covered by it, society considers the protection of existing property rights more important than facilitating transfers by insuring the security of acquisitions. These generalizations are, therefore, essentially expressions of society's judgments as to the value or relative values of the concrete materials and interests of individual and social life. They are such because each specific decision or legal rule summarized by them had implicit within it a judgment of that character. This does not necessarily mean that every such decision and principle involved a conscious appraisal of those ends and interests at the time they were made or formulated. It is, however, desirable to consciously recognize this characteristic of these general ideas and principles in our legal system if we desire its development to approximate a rational process. It is at least tacitly done whenever the reason of the rule is invoked in attempting to define its limits. Its explicit recognition is essential to prevent legal principles and premises from acquiring the character of unconditioned absolutes that the desire for definiteness is likely to impose upon them. The common distinction between *malum prohibitum* and *malum in se* furnishes an instance of that tendency. It is perfectly intelligible if considered as a device for stating that society considers certain values more important than others; it is of doubtful value if taken as a permanent and necessary classification of acts based on their inherent nature. Its uncritical acceptance inevitably stifles efforts at understanding the real basis for differences in legal rules invoking it. That A's accidental killing of B is manslaughter if A was at the time wantonly shooting at his neighbor's chickens, but no crime of any kind if A was shooting game in violation of a

statute, is scarcely explained by basing the difference in the legal nature of the killing on the fact that shooting at the chickens is *malum in se* while shooting game in violation of statute is *malum prohibitum*.¹⁸ The difference in the legal nature of A's act under those differing circumstances may be justified, but it adds little to an understanding of legal processes to derive it as an inference from the distinction between *malum prohibitum* and *malum in se*. The result is not so irrational if we consider the actualities intended to be described by these rather formalistic phrases. The law evidently regards private property in the chickens of more importance than the state's interest in wild game, and therefore subjects to greater risks infringements of the former than of the latter. The distinction between *malum prohibitum* and *malum in se*, and its use in legal reasoning, thus becomes intelligible, but at once loses its absolutism because its character as a shorthand method of stating a series of group judgments of relative social values is thereby disclosed and it becomes easier to grasp the idea that they are judgments that time and place may modify. A similar analysis would reveal the value judgments implicit in other general legal principles; they are frequently explicit in what have been herein called the broad premises and assumptions of legal systems. Their consideration from this angle discloses legal development, whether by legislation or judicial decision, as a continuing process of the selection of values and a scale of relative values that society is attempting to make effective through law. The realization that this is what is happening is of more than theoretical importance; it is a practical aid for the intelligent practice of law.¹⁹

The fact that these general ideas embody group judgments as to the relative worth of different human ends and activities does not wholly explain even the method of legal development. The history of law records the rise, decline and even disappearance of many of such judgments. The law of feudal England clearly aimed to maintain a different kind of society than that of nineteenth century England. The law of the earlier period accepted governmental price fixing as a quite normal thing; that of the later period considered it a policy to be invoked only in exceptional cases. A legal system at any given time contains a great many of such judgments based on past experience and presently competing

¹⁸See discussion in Bishop, *Criminal Law* 9th ed., secs. 331-333.

¹⁹Cardozo, *The Nature of the Judicial Process*.

forces. The decision of each new case on the basis of principles theretofore developed involves a determination that the old scale of values is to be retained. If a legal system imposes liability only for fault, every denial of relief where the injury is not due to some one's fault constitutes a reaffirmation of the validity of past value judgments. Those past judgments, therefore, can function as creative forces in shaping law only as long as, and to the extent that, a decision is made that society shall continue to aim at realizing the order of values derived from the past. The first decision in the legal system, assumed in the illustration just given, imposing liability independently of fault represents a first step in establishing a new value judgment as an efficient force in legal development. The process by which old principles are redefined in adjusting conflicts between them is essentially a revision of past value judgments of a somewhat less dramatic kind. It represents, however, the most common form in which such revision occurs in developed systems with a long history. The sudden introduction of a new value to be realized through law may at times involve all the inconveniences incident to rapid readjustments.

This process of revision is likely to be a rather continuous one except in periods of extreme stagnation. It is accomplished in our system by both legislation and judicial decision. The theory that the common law is adequate to meet the changing conditions of a world that refuses to stand still is a sufficient recognition of the function of courts in this process.²⁰ The truism that legislatures have greater freedom in this respect than courts requires no discussion. The former are subject to legal limitations only where constitutional provisions restrain them. Such restrictions on legislative action as our due process clauses and the other provisions of our bills of rights are themselves definite commitments to the theory that our society deems certain values of such importance as to be beyond the reach of ordinary legislation and requiring an extraordinary process for their modification or elimination. It is immaterial in this connection that some of them are expressed in terms so broad and vague as to render considerable revision possible without recognizing any formal change. More than a half century of litigation has failed to define the precise values protected by the due process clause of the fourteenth amendment, and

²⁰W. B. Hornblower, *A Century of "Judge-Made" Law*, 7 Col. L. Rev. 453.

the decisions disclose considerable differences as to the degree of individual freedom it protects. The rent legislation sustained in *Block v. Hirsh*²¹ and *Marcus Brown Holding Co. v. Feldman*²² would almost certainly have been held invalid by the court that decided *Mum v. Illinois*.²³ Even these constitutional limitations, however, do not deny the group's right to revise the scale of values handed down to it from the past; they merely restrict the legal methods of their revision. The argument sometimes advanced that there are implied limits on the power to amend the federal constitution is clearly untenable.²⁴ There is, perhaps, no politically organized society whose legal system does not assume a right of such revision vested in some one or more of its organs. The only method which it would be at all logical for the law to deny is that by revolution. Though, as already stated, courts exercise this function in our system, they have evolved one conspicuous principle aimed at retarding the rate of such revision, namely, the familiar principle of interpretation that statutes in derogation of the common law are to be strictly construed. It would be difficult, if not impossible, to find a logical justification for it; its real basis is the historical importance of judge-made law in our legal system rationalized into that philosophic theory as to the nature of the common law long entertained by our legal profession.²⁵ The rationalization was intended to justify an innate conservatism, and the principle itself reflects and embodies a theory as to the relative values of stability and change in the achievement of a social order through law. This is its most significant aspect. Like every other general legal principle its essence is the value judgment implicit in it. This negative factor must not, however, blind us to the important and useful part played by our courts in those revisions of the values our society has sought to realize through law that have given that law its vitality in a changing society. The technique by which courts have performed this function is beyond the purview of the present discussion since it would require detailed consideration of such problems as the function of logic, analogy, fiction and interpretation in the development of law.

²¹(1921) 256 U. S. 135, 65 L. Ed. 865, 41 Sup. Ct. 458.

²²(1921) 256 U. S. 170, 65 L. Ed. 877, 41 Sup. Ct. 465.

²³(1876) 94 U. S. 113, 24 L. Ed. 77.

²⁴See argument in *The Prohibition Cases*, (1920) 253 U. S. 350, 64 L. Ed. 946, 40 Sup. Ct. 486; see also *Leser v. Garnett*, (1922) 258 U. S. 130, 66 L. Ed. 505, 42 Sup. Ct. 217.

²⁵See generally Carter, *Law: Its Origin, Growth and Function*.

The preceding discussion has shown a legal system as a complex series of evaluative judgments that are frequently inconsistent. The complexity and inconsistency merely reflect the frequent absence of agreement among the members of the social group as to what interests and ends are worthwhile, which shall be sought if some only are obtainable, and how far one shall be pursued at the expense of others. A society of artists would scarcely hold that aesthetic ends alone did not justify exercises of the police power; one composed of average persons as we know them might well refuse to surrender any end more directly connected with its material needs to attain the former. The ends a legal order aims to achieve at any given period are the product of past experience and presently competing forces. The emphasis on individual freedom in our own present system can be explained through history, but that cannot explain how its selection for realization by law came about in the first instance. It would be a difficult, but not impossible, task to discover the ends and order of values aimed at by a legal system at any given time. It would, however, merely furnish a catalogue of our premises that should be extremely useful but would leave untouched the problem of how that system came to select them, which should be carefully distinguished from that of how they should be selected. The factors determining the actual selection raise several distinct but related problems. The order of values a state seeks to impose by law derives its elements from the wants and aspirations of individuals composing the social group. These do not all have the same scale of values. There are certain to be a limited number of human objectives common to practically all the members of the group; and it is quite likely that a considerable proportion of the group will rate the relative order of those objectives in the same way. Most men would sell a treasured art object to keep from starving; the case of the Viennese artist who preferred to starve to selling his piano is bound to be an exception. These individual value rankings, however, usually define only an order of ends that each individual conceives as his own. They state the order in which he will satisfy his wants, not how he ranks his desire for luxuries in comparison with another's desire for necessities. The principal problem of any social group with limited resources is the evaluation of the claims of its different members, and the order of values it undertakes to establish through law is comprised in large part of a series of judgments on the relative

importance of such competing claims. There are some who would include therein even the cases in which the group conceives itself as a unit making claims on its own behalf. It follows that the presence of certain premises in a legal system cannot be fully explained in terms of the existence of a fairly general, or even universal, agreement on an individual scale of values among the members of a social group. There are perhaps none who would rate gum-chewing as high as adequate housing, and yet a legal system that attaches a high value to individual liberty may in practise permit the desire of some to chew gum to be satisfied in preference to the want of others for a proper shelter. The result does not prove that the whole group, or even a considerable part of it, consciously rates individual liberty so highly as to be willing to accept even that consequence, but is capable of a variety of interpretations. It may mean merely that that particular part of the group that is able to get its views adopted into the law considers individual freedom not too dear even at that price, and that the others prefer from reasons of ignorance or inertia to acquiesce. The value judgments that become legal premises are usually those of less than all the members of the group, and may be those of a comparatively limited portion thereof. They define the relative order of the competing claims, similar or dissimilar, of the members of the group. They need not give equal weight to the same claim of different individuals; the safety of a high official may be rated more highly than that of an ordinary citizen. They may even rate one claim of an individual or group higher than another claim of another individual or group though all concerned would place the latter above the former in their own individual value scales; A's freedom of contract may in effect be given or permitted to have precedence over B's claim to a standard of living which A himself might deem more important for himself than complete freedom of contract. They cannot, however, go too far in this direction without arousing an opposition that may in time destroy them. The factors that determine whose value judgments become legal premises are primarily matters of political theory, although they impinge on legal theory in so far as courts function in their selection. The whole question of how far courts shall be guided in testing legislation for conformity with due process by general opinion that a particular exercise of the police power is a reasonable means for accomplishing a given end illustrates this.²⁶ It

²⁶See J. L. Nesbitt, *Due Process of Law and Opinion*, 26 Col. Rev. 23.

is, in any event, the task of legal theory to describe what happens when a legal premise is adopted. It is essential not only to know that such premises represent value judgments that the group is undertaking to make effective through law, but also to grasp the play of forces that operate in their selection. It shows in part how a system gets its premises and their relation to the facts of individual and social life; the insoluble why thereof it leaves unanswered.

A legal system, however, is something more than a system of such premises. That represents but one of the many points of view from which it can be considered. It is equally a system of social machinery for effectuating the ends postulated by the society living under it. The evaluation of that machinery to determine its fitness for realizing those assumed ends constitutes an important practical problem. This requires no further emphasis in these days of constant complaints that the machinery of our criminal law has suffered an alarming breakdown. It is in dealing with problems of that character that the methods of science can and should be employed, in the sense that the judgment whether or not the means adopted tend to produce the intended results should be based of an inductive study of the facts. It will probably be practically impossible to employ the methods of deliberate experimentation to any great extent in this connection. It is theoretically possible to determine the relative tendencies of capital and other forms of punishment to prevent murder, although the quality of many of the studies of the correlations between social data should guard one against the uncritical acceptance of their conclusions. A society that assumed that the sole end of punishment was prevention might well govern its choice of punishment for murder by the results of such investigations. They would not help that society to decide whether to adopt prevention of murder or the reform of the murderer as the end of punishment unless they disclosed that no punishment prevented murder, which might induce it to abandon the former for the latter theory. Certain legal principles are important as means for realizing ends expressed in some more inclusive premise. Freedom of contract is significant because of its relation to individual freedom. It is a question of fact whether a given form of the former insures the development of the latter, and should be determined by an inductive study of the facts rather than a priori reasoning. The method is not limited to testing the adequacy of the means

adopted to secure an assumed end. The conformance of legislation to the requirements of due process may depend on whether it is a reasonable means for promoting a recognized police power end. Whatever may be the character of a judgment that it is a reasonable means, the judgment that it is a means, which underlies the former, is one of fact that should be arrived at by the best technique available for discovering relations between factual data. Wherever the legal quality of an act is made to depend on its relation to some end assumed by the legal system, the methods of induction and investigation of the facts can be invoked to determine whether that relation exists. There may be some instances of that character where the relationship can be determined without it. It is not required, for instance, in order to reach the conclusion that contracts not to marry are contrary to public policy as that is conceived by the society in which that rule prevails. But such cases will probably be exceptional. This does not mean that each decision, or proposed new law, must be preceded by elaborate studies of this kind; there is no reason why the results of past experience summed up in current judgments of relationships between facts should not be frequently relied on. They are often as accurate as those that are the product of what is called science. There is, however, no denying the desirability of employing the methods of scientific induction in the fields indicated in this paragraph, and to check the truth of whatever assumptions of fact underlie existing legal machinery and theories. Its applicability to problems of a different character will be subsequently considered.

The method just discussed is frequently contrasted with that of reaching legal conclusions by the methods of deductive reasoning to the disadvantage of the latter. It is argued that the wide disparity between law and the facts of social life is due to an undue emphasis on and abuse of deduction in legal reasoning.²⁷ It is not denied that logical deduction is a legitimate device in those fields of law where the principal desideratum is certainty, but it is felt that the method has been applied in fields for which it is wholly unsuited. The cases generally relied on to support this view are those involving the validity of social legislation under the due process and other constitutional provisions, and those dealing with the application of old principles to situations raising issues of social policy on which the widest differences of opinion

²⁷Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605.

exist between the conservative and liberal groups in the community. It is a vital element in the sociological jurist's criticism of our legal order, which alone would justify its consideration. The facts afford a real basis for their criticism, but their real objections are rather to the premises adopted than the mere use of deduction to arrive at the conclusion. The critics of such decisions as that denying the validity of minimum wage laws for women object primarily to the courts' conception of liberty and their judgment that such regulations are not a reasonable means for promoting a recognized police power end. Courts and critics would agree on the barren legal formula that every limitation of individual freedom by legislation that is not a reasonable exercise of the police or some other governmental power is a deprivation of liberty without due process of law. The hopeless conflict between their conclusions is, therefore, due to some other reason. It may be due to the adoption of different conceptions of what constitute reasonable exercises of such powers; it may, on the other hand, be due to different judgments as to whether the same legislative act has that character under a definition accepted by both. The former represents a difference in their major premises; the latter, in their minor premises. The premises employed in reducing legal thinking on problems of this character to logical form are not mere statements of relationships between facts but embody judgments as to the relative importance of competing ends. The minimum wage decision might mean either that the court deemed individual freedom in that phase of economic relations more important to the groups directly affected and society than the benefits to them that might result from the higher standard of living rendered possible by the prescribed wages, or that it considered that such benefits would not flow from minimum wages. It is only in the latter case that the decision could be said to be wholly predicated on an assumption of fact, and, therefore, be open to an attack that the facts had been ignored that could be appraised without raising the whole problem of how ends should be selected. If the former alternative states its correct basis and meaning, the attack will have to be directed at the theory of values adopted by the court. The validity of its selection cannot be disproved merely by showing error in its judgment as to the relation between minimum wages and their alleged beneficial results. Its preference for individual freedom in the matter of wage contracts is perfectly consistent with the recognition that other values could be

secured by its surrender. To criticize its choice on the score that it has taken either no account, or insufficient account, of those facts or any others that might be advanced, is intelligible only if there be adopted some theory as to the relationship that should exist between facts and the selection of values against which the choice in question has offended. A theory of that type is implicit in every criticism of particular choices made in judicial decisions or legislation on the score that they ignore the facts or that they involve the mechanical application of conceptions evolved in disregard of the facts of social life. The failure to make it explicit deprives such criticisms of a considerable part of their value. It is a case of confronting one assumption with another with no recognition by either side of the true character of the dispute between them. If, then, the essence of the objection to logical deduction in legal development is to the premises adopted, there is every reason to so state it. The problem of evaluating the choices actually made, of examining the validity of the premises actually adopted, is as inescapable as it appears to be insoluble.

It has already been stated that legal premises embody those judgments as to the relative worthwhileness of different human ends that are for some reason or other sought to be realized through law, and that there is usually a constant struggle for their revision. They can be explained in terms of past history and present competitions; and the factors that have determined whose views should secure the backing of state force can be discovered. It is a truism that they have their roots deep down in the facts of human nature, and are the product of human experience and thinking about that experience. It is equally patent that they represent but an imperfect synthesis of the competitions among the members of the social group, and, therefore, seldom effect that perfect adjustment of conflicting claims that makes all feel that they are making equal sacrifices for equal benefits. The owner of a coal yard who is taxed to support his municipal competitor will quite likely believe himself the victim of injustice; the person who is denied a certificate of convenience and necessity to operate a bus line between points adequately served by existing facilities can scarcely be expected to approve the theory on which that requirement is based. It is this practical certainty that the choice of a particular value for legal protection or promotion will generally entail the sacrifice or subordination of others deemed more important by some members of the social group that has raised the

problem of what should determine the selection of values to be realized through law. It is one to which different thinkers have given the most diverse answers. It looms largest in legal discussions whenever discontent with what is, produces attempts as rationalizing current dissatisfaction with prevailing legal standards. It invariably involves an effort to appraise the existing legal order by reference to factors outside itself, and is an important part of the technique by which new values secure recognition in law. Its consideration leads the speculatively inclined to that quest for ultimates that experience shows foredoomed to failure. The quest is not, however, futile on that account. Its success is not to be gauged by its failure to solve the insoluble, but by the value of the critical examinations to which it subjects current assumptions. Its existence as a vital problem in legal theory cannot be denied. It is as frequently considered by those who approve the existing legal order as by those who are attempting to inject into it new values. The appeal to right and justice is not the exclusive argument of those who disagree with a particular decision or statute. The proponents of the eighteenth amendment invoke it at least as frequently as do its opponents. It is not, therefore, a matter of raising a novel problem; it is merely that of consciously recognizing one with which all who are interested in general problems of law are constantly concerned. The recognition of its importance need not, however, involve any commitment to any of the answers it has received.

This problem must not be confused with that of how a legal system or any part of its works. The latter involves two distinct problems. It may refer either to attempts to discover the results in fact produced by a given legal system or part thereof, or to determine their effectiveness for achieving results assumed as desirable. These are both important, but neither raises the question of that competition among ends that constitutes the essence of the instant problem. They can both be treated by the methods of science since they involve only judgments of fact, while it raises questions of evaluation that transcend those methods. The latter proposition has frequently been denied,²⁸ and the denial is likely to gain force with the increasing vogue of science, particularly in dealing with human conduct. The ends actually pursued by a legal system are those believed in by some of the social group.

²⁸See O. W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443.

The same is true of those postulated as those it should aim to realize. The elements of the choice are, therefore, data discoverable by an investigation into what men want and the order in which they would prefer to have their wants satisfied. The question is whether the facts alone can disclose not only which choices prevail but which ought to prevail. The result of such decisions as that in the minimum wage cases is to permit a distribution of the social product in certain proportions that differ from those that would have been effected had such laws been enforced. The purchasing power of the community would be differently distributed under the two systems of wage determination; some would have more, others less, influence in giving direction to the community's economic forces. It is not impossible to predict the probable difference in results that would follow the selection of one or the other of these alternative positions as to the validity of minimum-wage legislation. Those facts however, would give no clue as to which series of results society ought to choose. If the choices that should be made are ever to be derived as inferences from facts it will have to be because the facts disclose a moral order of interests, a necessary order thereof based on the nature of individual or group conduct, or some dominating interest to which all others are related as means. It would be dangerous and futile to deny the possibility or wringing from the facts some such test in the future; it is safe to say that past efforts to do so have proved unavailing, and nothing on the intellectual horizon presages success in that direction within the near future. It may be that the problem is itself an illusion; it is still true that the question is being asked as insistently as ever. Man seems bent on questioning the right of the accepted value judgments to continue their existence as legal premises, and on giving a rational justification for this attitude. As long as this apparently ineradicable habit persists, legal thinkers will continue their efforts to answer the problem even though our present inability to adapt the technique of the sciences to it may expose their answers to the charge of being pure speculation.

Doubts as to the validity of existing legal standards are not always raised on behalf of competing standards, but occasionally reflect only a belief or theory that their validity can never be proved. The latter is frequently, but not always, a mere device for concealing the former. An attack on individualism may in fact be made on behalf of socialism though couched in terms

merely questioning the former's ability to prove its right to exist. Both types aim at the elimination of accepted values, and usually to substitute others, although the latter aspect is clearer where the critique is frankly made on that basis. It is difficult, when surveying and observing the interminable controversies about standards in the past and present, to escape the feeling that all are quite arbitrary in the sense that we know of no principle for deciding which should be preferred. This is, however, as true of those that are struggling for adoption into the legal system as of those already incorporated in it. It is a viewpoint that makes of appeals to justice reliances upon illusions, which, however, does not necessarily mean that they are futile. There have been few thinkers who have frankly adopted a theory of standards in this field that made them pure creations of man's thinking and other processes. There have been more who have conceived them as revealed by God or discoverable by man than have considered them man-made. A common assumption underlies the thinking of those who believe it is for science to determine the relative worth of our different social ends and the somewhat discredited natural law jurists who considered ultimate standards discoverable through reason. Both assume that the ends men should strive for are something more than mere mental constructions, and that there is an order of values that exists about which we can and do think but which does not owe its existence to those facts. In so far as both aim to set up a criterion by which to measure actual legal systems, they make the further common assumption that such objectively existing standard is that which law should aim to realize. The same is true of practically every attempt at evolving a theory as to the ends of law though there exist the greatest differences among them as to the methods by which such standard is to be discovered. Some seek it through philosophy and metaphysics; some through science; some through history; and others by a comparative study of social and legal institutions. These differences in method cannot, however, obscure the common assumption of them all. There is danger of losing sight of this whenever a theory of ends is advanced in the name of science or framed in terms of social welfare. It is not the purpose here to discuss the correctness of such assumptions, nor the relative merits of subjectivism and objectivism. The aim is merely to indicate the common assumptions underlying the various discussions of the ends of law and of the tests employed in measuring existing

systems and to give direction for their further development. It is a purely salutary measure intended to offset the tendency toward dogmatism that prevails among proponents both of the status quo and of change.

The detailed consideration of the various ends and orders of values formulated by legal thinkers, and of those actually adopted by legal systems, would require a survey of the history of legal thought and institutions beyond the scope of this discussion. It would, moreover, only reveal that same lack of agreement that prevails in the legal thought and practices of the day. There appears as yet no principle for determining which is the more nearly correct. All embody assumptions and represent in large measure acts of faith; and this is the common quality of both those incorporated in existing legal systems and those developed for testing the validity of the former. No controversies are as likely to prove insoluble as those concerning assumptions. There are, however, certain problems connected with these efforts to subject law to an external critique whose discussion is of some value. All are quite likely to be formulated in terms of some single inclusive end for law. It is thus that we obtain such general formulas as the greatest good to the greatest number of the English utilitarians, the realm of realized freedom of certain German metaphysical jurists, and the predominance of the social interests of our own sociological school. The inevitable vagueness of such expressions is shared equally by those premises from which courts and lawyers reason in dealing with the problems of due process and public policy. It is, therefore, unfair for the practically minded to object to them on that score, but it is equally unjustifiable for those who criticize the actual law from these broad viewpoints to stop with the mere assertion and repetition of their premises. The minimum wage decisions may have been wrongly decided, but it adds little to our enlightenment to be told that they conflict with a particular theory as to what kind of a social order is desirable. It may be true that the premises from which our courts reason are those of a past era unsuited to present needs, but the objection would have greater weight if some effort at least were made to make explicit the social theory implicit in it and to present its claims in competition with that implied in the judicial thinking criticized. The sociological school of jurisprudence has undoubtedly been a factor in causing a shift in emphasis on the values that the legal system has undertaken to pro-

mote. The time has, however, come for it to make more explicit the social theory it accepts as a premise. Individualism is itself a social theory. The sociological jurist can hope to attack it successfully only when he recognizes it as such and formulates with more definiteness than has yet been done the outlines of his competing theory.²⁹ Its emphasis on the social interests must be made more intelligible, not by stating what they are or by attempts at cataloguing, but by analyzing the conceptions themselves. A whole theory of the nature of society and of the social process is implicit in it which is extremely difficult to formulate because of the complexities involved. And yet the greatest benefits from the adoption of its point of view are probably tied up with making that type of analysis. What has been said of the sociological school is equally applicable to any other general test of the legal order. The emphasis was put on it because of its wider currency at present and the general value of its past contributions to creating an understanding of law as a means to an end.

The vague and broad terms in which theories as to the ends of law have usually been phrased have created an impression that they have been developed at the expense of facts. The feeling is likely to increase, and justly so, if the methods by which some have been evolved are considered. This is particularly true of the extremely metaphysical jurists. The reasons for resorting to such methods are, as already stated, inherent in the nature of the problem. We have not yet acquired a technique for deriving what ought to be solely from what is, and have, therefore, resorted to the methods of philosophy. It may be that we shall never acquire it except by assuming that that which is is that which ought to be. The part facts should play in constructing our theories of ends and of the ends of law, and what facts are significant in that connection, are problems seldom considered and still unsolved, but that will have to be frankly faced by those who believe that science can determine the relative worth of our social ends. Until that is done the talk of a science of law in a sense other than the formal science of the analytical jurists will rest on no securer basis than the theories of the philosophical jurists, if intended, as is usually the case, to define a method for testing actual law as distinct from merely describing in generalized terms what actually happens. That the ends postulated are in some fashion related to the facts

²⁹For a critique of sociological jurisprudence see Lepaulle, *The Function of Comparative Law*, 35 Harv. L. Rev. 838.

of individual and social life is undeniable, and is tacitly recognized in all theories of such ends. It is an assumption common to them all. The natural law school's theory of ends had a basis in some of the facts of human nature; that of the modern sociological jurists finds similar sanction therein. The real difference between them is one of emphasis. Men's conceptions of what ought to be are usually derived from what is, but the final view is affected by their thinking about it and that is not necessarily confined within those limits. The fact that all such theories assume that the ends adopted should have some reference to the facts affords a basis for their comparison. It is necessarily inadequate in the absence of proof of a common view of the exact relation between them, but not, therefore, wholly useless. It may, for instance, be possible to demonstrate to an adherent of the natural law premises that his scheme is based on an assumption of fact that is no longer true. Such proof might well induce him to modify his theories, or even accept a competing one, as required by assumptions he considers valid. It is apparent that this process of modification and adjustment of our premises in the course of their competitions is possible only because of their common assumption already referred to. It would be futile to expect to modify by it a view that law should aim at the most rapid elimination of the human race adopted in frank opposition to the fact that men desire to live and continue their species. The constant checking of our premises by reference to the facts is, therefore, valuable because it is the only way we have for comparing competing theories as to the ends law should aim to achieve. In the final analysis, however, the formulation of our views as to the ends we should strive for contains an element that has thus far defied the technique employed in discovering facts, and between which and the facts we have not yet been able to establish a correlation. It is, therefore, premature to expect the competitions between ends to be decided wholly by the ordinary appeal to the facts. Their conflicts cannot be resolved solely by invoking the test of how they work, since the issue is between rival conceptions of what work should be accomplished.

The present is a time when the premises from which our law proceeds are being subjected to a searching critique. It is futile to blink the fact that not all discontent with law is based on a breakdown of its machinery. A large part of it is traceable to differences of opinion as to the kind of social order law should

aim to construct. These were clearly reflected in the opposing views expressed in the arguments on the Mellon tax plan, and in the prevailing and dissenting opinions in the minimum-wage case. The dispute is not one that can be intelligently understood or rationally discussed by frequent and positive assertion of opposing views. The dogmatism of vague terms is not the exclusive privilege of defenders of the status quo; it has a large and faithful following among the advocates of a different social order. The avenue of escape does not lie in analyzing legal systems for the purpose of reducing their materials to logical form, but in an understanding of what is involved when society makes law. It is only the perception by all concerned that it is a controversy about premises, whose adoption involves assumptions in every case, that can eliminate that dogmatism and absolutism which characterizes so much of our discussion of problems in legal and social policy. It is desirable that they who play the largest part in shaping law should consciously grasp the true character of their activities. It is this that makes the consideration of the general problems of legal theory, and of the answers that legal thinkers have given them, of more than speculative interest.